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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Appellant,

VS.

HUBERT L. WILL, ET AL.,

Appellees.

On Appeals from the United States District Court
for the Northern District of Illinois

BRIEF AMICUS CURIAE OF THE CHICAGO BAR ASSOCIATION SUPPORTING APPELLEES

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SUMMARY OF ARGUMENT

> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Article III, section 1, United States Constitution.

The purpose of the prohibition against diminutions of federal judges' salaries contained in Article III, section 1, was to prevent judges from being tempted to favor Congress in deciding cases, as much as it was to prevent Congress from punishing judges for decisions not to its

liking. This guarantee was devised for the protection and benefit of the public, not for the private welfare of a particular judge. The rule proposed by the Government in this case, that diminutions in compensation of federal judges be permitted because the compensation of a few other federal employees was diminished as well, entirely ignores this purpose. For, whereas Congress might find it difficult to punish the judiciary in a statute lowering the salaries of a large number of federal officers, the temptation to judges to seek an exemption from such legislation is not lessened by the inclusion of other federal employees. That this temptation is unavoidable to some degree because of Congress' authority to *increase* judges' compensation does not refute that the Framers intended to eliminate the temptation in the circumstances far more to be feared: where compensation was being *diminished.*

It is incorrect to limit the protection of Article III, section 1, to merely the salary presently received by a federal judge. The term "compensation" extends to a formula as well; specifically, to a cost-of-living adjustment. The entitlement to such an adjustment vests with the statute's enactment, and cannot be taken away upon the payable date of each annual adjustment. To limit "compensation" merely to cash in hand prevents the Congress from ever guaranteeing a cost-of-living adjustment in a certain enough way to attract qualified attorneys to become judges. It also belies the expressions of the Constitutional Convention, and the experience of the Framers with inflation. Judges who give up the private practice of law also give up the ability to adjust with inflation so as to guarantee the steady value of their earnings. The cost-of-living adjustment scheme at issue here was itself inadequate to prevent diminutions in real compensation of the order of 21% to 32%. Yet, denied its benefit, judges' salaries have declined in real terms

by 35% to 44% since 1968. Whether or not Congress was obliged to provide a cost-of-living adjustment scheme to federal judges, it has in fact done so; and to allow a later Congress to withhold the payments under that scheme denies to every Congress the authority to make part of undiminishable Article III compensation whatever a particular Congress might deem necessary to attract and retain quality judges.

INTEREST OF AMICUS CURIAE

> He has made judges dependent in his will alone, for the tenure of their offices, and the amount and payment of their salaries.

The Declaration of Independence.

> I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.

John Marshall, *Debates of the Virginia Convention, 1829-1831*, 619.

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the Judicial from the Legislative power, in any system, which leaves the former dependent of pecuniary resource on the occasional grants of the latter.

Alexander Hamilton, *The Federalist*, No. 79 (Scott, ed., 1894) 431.

> In the past ten years the lot of judges has not been easy. Although burdens became heavier and costs of living increased dramatically, Congress failed to provide needed judgeships and fell far short of maintaining a level of compensation called for by inflation, as

> was done with virtually all other personnel of the federal establishment.

The Chief Justice, *Annual Report on the State of the Judiciary—1980,* 66 A.B.A. Journal 295, 299 (March, 1980).

The Chicago Bar Association is the largest voluntary-member metropolitan bar association within the United States. Its members practice before every federal bar; and strive to uphold the highest principles of conduct in the legal profession.

> The purposes and objects of this Association are: to establish and maintain the honor and dignity of the profession of the law . . . to increase the usefulness of the legal profession in promoting the due administration of justice and the public good . . . .

Article II, Articles of Incorporation of The Chicago Bar Association (As Amended, June 1977).

That federal judges be unbiased is an absolute prerequisite to the task mutually assumed by courts and counsel that justice be done. That federal judges in addition be drawn from the very highest quality of counsellors is greatly to be desired, for the good of our country, our clients, and our profession.

The present matter before the Court implicates these concerns to the highest degree. The Government has urged certain positions upon this Court that are most troubling, in that, we believe, they would prevent the Congress from taking those steps necessary for the attraction and retention of the highest caliber of federal judge.

Amicus curiae affords the point of view of the practitioner before the federal courts; a point of view removed

from any hope of personal pecuniary gain;[1] and removed as well from any constraints the appellee-judges themselves might feel not to overstate the importance of their own positions. In point of fact, however, it is difficult to overestimate the importance of a high quality, totally independent federal judiciary to our Constitutional scheme.

By vote of its Board of Managers, the Chicago Bar Association resolved to seek leave to file a brief *amicus curiae* in these appeals. *Amicus* supports the position of appellees in these cases. Consent to the filing of this brief has been obtained from the Acting Solicitor General and from the attorneys for appellees.

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[1] The judges who brought this cause of action were the only parties with standing to raise the serious constitutional questions at risk. Their decision to press this litigation, at risk of embarrassment to themselves and their brothers, must be admired as an exercise of their high obligation to resist all encroachments upon the independence of the judiciary, for the benefit of all citizens.

"In the light of the foregoing views,—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. . . . The judges of the Court of Appeals of Virginia, as far back as 1788, in discharge of the same duty, directed to the members of the state assembly a 'respectful remonstrance' against an act which had the effect of reducing their compensation. 4 Call (Va.) 135, 141. . . .

"Actuated by like considerations of public duty, as it is averred, these plaintiffs brought the present suits." *O'Donoghue* v. *United States,* 289 U.S. 516, 533-534 (1933).

ARGUMENT

1. Neither precedent nor practicality support Appellant's rule that diminutions in judicial compensation be permitted unless proven to be discriminatory.

Because of the colonial experience, a large amount of the historical material bearing on Article III, section 1, is concerned with preserving federal judges from an undue dependence upon the Congress. The Constitutional Convention debates themselves dwell on the possibility that a federal judge would be untowardly sympathetic to Congress while a bill to reduce judges' compensation was pending in Congress. M. Farrand, *The Records of the Federal Convention of 1787,* volume 2 (1966), at 45 (remarks of James Madison, July 18, 1787).

Commentary at the time the Constitution was being considered by the several states brought up the additional concern that the Congress be prevented from punishing federal judges, in particular or in general, by reducing their compensation.

> [T]he Judiciary is, beyond comparison, the weakest of the three departments of power; . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.

The Federalist, supra, No. 78 (Hamilton).

> It was therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of the body to change the individual for the worse.

The Federalist, supra, No. 79 (Hamilton).

It is important to observe that the historical discussion focused upon two separate fears: first, that judges would

try to curry favor with Congress by favorable rulings; and second, that Congress might try to punish judges by lowering their compensation. Only the second rationale receives any treatment in the Government's brief. Indeed, the Government would permit Congress actually to *lower* the compensation of federal judges, so long as the compensation of some other federal officials was lowered at the same time. (Brief of the United States at 67, n. 55).[2] In such a setting, the Government argues, there would be no attempt by Congress to punish federal judges.

Whatever other weaknesses this novel argument might have (such as an undisguised alteration of the plain meaning of the Constitution), it cannot be said to reflect adequately the first set of concerns of the Constitution's framers. For, even if all other federal officials were included in the reduction, a judge or Justice might hope to win an exemption for judicial salaries in the legislation, and to that end, might be tempted to favor Congress or one of its statutes when it arose for construction or review.[3]

It might be responded that the same temptation exists when an increase in compensation is under consideration;

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[2] One difficulty with the Government's position is that it cannot specify how large the group, including judges, must become, to avoid constitutional condemnation. In the present case, the group of federal employees whose compensation has been diminished is quite small; only executive schedule employees and congressmen are included with the judges. This is a miniscule proportion of the total number of federal employees.

[3] Precisely such an exemption was granted in the general compensation reduction laws of the Depression-era, *see, e.g.*, 47 Stat. 382, 402 (1933), and again in 1975, when judges were exempted from any downward revisions ordered for all federal employees under the Comparability Act, 28 U.S.C. § 461(b). These exemptions, of course, occurred because Congress had no choice, and not because Congress had been successfully lobbied.

and that is true. For precisely that reason, Madison sought to ban increases as well as diminutions in compensation. Madison's original draft read just that way. It was amended to allow for increases that inflation, a rising standard of living, and a growing workload would require.

But *the ban on diminutions, which Madison thought were more to be feared, was maintained* for the reasons Madison suggested. *See* M. Farrand, *supra,* at 44-45. The final phrasing was the result of this compromise.

Now, the Government looks at the fact that increases are allowed and thereby concludes that the goal of preventing temptation of judges or Justices to favor Congress is not a serious motivation underlying Article III, section 1. Yet that concern remains an important rationale, expressed in the Constitutional Convention itself, for Article III, section 1; and must be taken into consideration in any interpretation of that Constitutional provision. The power to diminish compensation was seen as especially formidable. Hence, the power was removed.

With such an understanding, the Government's position that diminutions in judicial compensation were permissible so long as *some* other federal employees are included as well, is wholly inadequate. Federal judges frequently (almost daily) have the chance to favor the Congressional point of view on the constitutionality or construction of a statute. Motivations for judicial decisions are impossible to probe, and very rarely are reviewed at all. Accordingly, the Constitution simply removed this one area of possible compromise of judicial independence.

Of course there are many laws that might bear indirectly upon the compensation or status of the federal judiciary that are, nevertheless, perfectly constitutional. Congress' powers cannot be so circumscribed as to require an investigation of what impact might be felt on federal judges of

every statute, no matter how remote, in order to prevent the judges' being tempted. The appropriate line was drawn by Justice Holmes, dissenting in *Evans* v. *Gorc,* 253 U.S. 245 (1920), the same source relied on by the government for its rule:

> The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist (No. 79), that "a power over a man's subsistence amounts to a power over his will." *That is a very good reason for preventing attempts to deal with a judge's salary as such,* but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge.

Id. at 265 (emphasis added).

The Government looks only at the last sentence of this quotation, and not Justice Holmes' context, which concerned statutes other than those dealing "with a judge's salary as such." When statutes "dealing with a judge's salary as such" are at issue, the Constitution's prohibition against any diminution is absolute. *Cf., Atkins* v. *United States,* 556 F.2d 1028, 1045 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978). The Congressional action under consideration in this case *did* attempt to deal with a judge's salary, as such. And that action must be resisted, or the insulation of judges from the temptation to favor their paymaster, the Congress, will be lost.

The test the government would instead propose, an inquiry into *congressional* motivation, is unresponsive to this entire concern, and is itself, an unworkable and dangerous alternative. In the words of the American Bar Association, the government test is a "novel concept without support in history or authority which would completely undermine the Compensation Clause . . . ." (Brief of the American Bar

Association as *amicus curiae* at p. 8-9). The Government's innovation is an incomplete and unsatisfactory substitute for the Constitution's own protections.

2. "Compensation" was intended, and for practical reasons should be construed, to include a cost-of-living adjustment if Congress enacts such an adjustment.

The discussion so far has centered on the two rationales for Article III, section 1 based on preserving an independent judiciary: removing from judges the temptation to seek favors from Congress where their "salary as such" was at issue, and preventing retaliation by Congress against judges. A critical third rationale was also involved in the provisions for federal judges set forth in Article III, section 1. That rationale was to attract and hold the highest quality of candidate for the federal bench.

> The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary,* larger than the U.S. can allow in the first instance.

M. Farrand, *The Records of the Federal Convention of 1787*, vol. 2, at 429 (remarks of General Pinkney, August 27, 1787) (emphasis in original).

> The Amount of salaries must always be regulated by the manners & the style of living in a Country.

Id. at 45 (remarks of Gouverneur Morris, July 18, 1787).

> Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the station of Judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller, of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the Government can have no great option between fit characters; and that a temporary duration in office, *which would naturally discourage such characters from quitting a lucra-*

> *tive line of practice to accept a seat on the Bench,* would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Alexander Hamilton, *The Federalist,* No. 78 (Scott ed., 1894) 430-431 (emphasis added).

> The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.

Chancellor Kent, *Commentaries,* volume 1, at 294.

It is impossible to read the debates at the Constitutional Convention, the *Federalist* papers, and other contemporary commentary on Article III, section 1, therefore, without concluding that Article III, section 1, was designed to grant learned candidates the security and compensation necessary to lure them from the private practice of law. And it is also clear, from the citations already provided to the Constitutional Convention debates, that Congress was *expected* to use its power to adjust federal judges' compensation upwards when circumstances required. Benjamin Franklin and Gouverneur Morris argued against prohibiting upward adjustments because of this necessity, which would arise from inflation, a busier caseload, and a growth in the general standard of living in which the judges should share. M. Farrand, *The Records of the Federal Convention of 1787,* vol. 2 (1966) at 44-45.

As true as this observation is, there has always been a problem in reading into it any *obligation* on the part of Congress to adjust judges' salaries upward. The closest

any court has come to such a conclusion was the Court of Claims in *Atkins* v. *United States, supra.* There, one hundred and forty federal district and circuit judges alleged that the one-house veto of recommended pay raises, and Congressional inaction, had effectively caused their compensation to be diminished during the inflationary period from 1969 to 1976. The Court of Claims held:

> Certainly, were Congress not to budge on the nominal dollar salaries it allowed judges in the face of hyperinflation, while the earnings of most others rose in rough parity with the cost of living, the threat to the ability of the judges to stay in their posts would be so great that a demand for their relief under article III would be difficult to refute.

556 F.2d at 1054. The inflation from 1969 to 1974 was not held to be so serious, however, as to evoke upon the part of Congress a positive obligation toward the federal judges.

The unmistakable intention of the draftsmen of Article III, section 1, to induce and retain high quality judges who might otherwise stay in the lucrative practice of law, is not without some expression, however. The interpretation of that constitutional provision can and must borrow from this fact we know about the purposes behind Article III, section 1. Rather than dismiss that knowledge as an unenforceable expression of vague goals, as does the Government's brief in this case, the Court ought to utilize this knowledge in analyzing whether a cost-of-living adjustment plan, once granted by Congress, can vest *as a plan* upon the date of the statute's enactment.

The Government premises a very large part of its constitutional elaboration on the argument that a cost-of-living adjustment plan cannot vest, as such. By contrast, the District Court held that the federal judges became entitled, as part of their compensation, to the cost-of-living adjustment

formula set forth in 28 U.S.C. § 135: "Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), *as adjusted by section 461 of this title.*" (Emphasis added.)

A cost-of-living adjustment formula, set in place in 1975, does not become effective in the Government's view, until October 1 of each subsequent year.[4] But the Government's position is not restricted to the circumstances of this one statute. The Government presents to this Court the argument that no element of compensation vests until it is effective, and that in the context of a cost-of-living adjustment formula, the annual date on which adjustments are payable is the effective date.

The real danger from adopting the Government's argument, therefore, is its necessary implication that Congress can never make part of a federal judge's "compensation," as that term is used in Article III, section 1, an entitlement to a cost-of-living adjustment. If Congress chose to adopt a cost-of-living adjustment formula for federal judges, it could still block the payment of each increase called for by the formula as it came due. That provides no assurance of a cost-of-living formula at all. Yet Article III, section 1, was adopted to provide *assurance* to federal judges:

> A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

Alexander Hamilton, *The Federalist* No. 79, *supra*, at 432.

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[4] The Government seems not to notice the anomaly of contending that a statute passed in 1975 is not effective until October 1 of each subsequent year, becomes effective on that date *without operation of any other statute*, and then becomes ineffective again until the next October 1.

The Government would prevent Congress from ever placing a federal judge on such sure ground through a promised cost-of-living adjustment scheme. It is ironic, therefore, that the Government accuses the opinion of the District Court in this case of reducing the flexibility of Congress. The only inflexibility imposed by the District Court's opinion here is that which Congress itself has already assumed: that the federal judges were to receive the same percentage salary adjustments as were received by the General Schedule employees, for as long as the federal employees' pay comparability scheme was operative. To adopt the Government's view would remove from the power of Congress the ability to include anything under Article III "compensation" other than the paycheck most recently received by a federal judge.

This is a most unsettling conclusion. If the Court adopts the position urged by the Government, then those frequently expressed purposes behind Article III, section 1, to attract and retain quality judges, will be irreparably disserved. In the private practice of law, an attorney has command over his own business, and if he is able, can take steps to insure that his compensation does not seriously diminish over changing economic conditions. A federal judge, however, may not do that. It is solely for the Congress to see to his compensation.

Nor can we close our eyes to the practical effect of inflation when considering the impact of the rule the Government urges. *Amicus curiae* does not argue that Congress is under any obligation to increase the nominal levels of judges' salaries. *Amicus* does argue, however, that *if Congress decides* that a *program* of cost-of-living adjustments ought to be made part of a judge's Article III compensation, it may do so. And in light of the objective of Article

III, section 1, to induce qualified candidates to foresake the private practice of law, Congress would be well advised to consider just such a step. The 1975 formula was only a half-measure, granting judges not an absolute cost-of-living adjustment, but only as much of an adjustment as the General Schedule employees received. But as much as was granted must be paid.

While discussing these practicalities, it is instructive to look to the economic setting within which Congress acted. In the attached chart (Appendix I), the nominal and real levels of salary for federal district judges are presented for recent years. Assuming the same salary earned in private practice as on the federal bench in 1968, the chart shows how the average private attorney fared over the ensuing years. The results support the conclusion suggested above; in real dollars, the average attorney was well able to keep pace with inflation between 1968 and 1977.[5]

The chart also demonstrates that the salary adjustments called for by the 1975 statute did not result in princely sums: had these adjustments been paid, the judges would still be earning between 21% and 32% less (depending upon the price index used) in real dollars in 1979 than they were in 1968. ($31,494 or $27,043 rather than $40,000).[6]

And, most dramatically of all, the chart shows that in actual fact, federal district judges received in 1979 between

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[5] An attorney who was receiving $40,000 in 1968 was receiving between $39,074 (measured by the wholesale price index) and $42,501 (measured by the consumer price index) in 1977, measuring all sums in constant 1968 dollars.

[6] The government contends that Congress refused to fund one of the adjustments due judges to avoid giving more than what comparability demanded. That is plainly untrue, as the chart demonstrates. Furthermore, all things considered, a federal judge actually must be paid $98,356 in 1980 to be as financially well off as he was in 1970. *U.S. News & World Report*, July 14, 1980, p. 47.

35% and 44% lower salary in real terms than they received in 1968 ($26,086 or $22,399 rather than $40,000).

In this context, is it consistent with the purposes of Article III to rule that, even though Congress wishes and intends to guarantee federal judges a cost-of-living adjustment plan on which those judges can rely as part of their constitutional "compensation," it may not do so?

The framers of Article III, section 1, were well-acquainted with inflation. From 1775 to 1781, the wholesale price level in the United States had risen 188%. The value of currency had declined more than 65%.[7] Stipends fixed in nominal terms evaporated. Complaints were brought in Virginia by both parsons and judges who were paid in paper money. *Remonstrance of the Judges,* 4 Call. (Va.) 135 (1788).

James Madison even proposed to the Constitutional Convention that federal judges' salaries be adjusted according to the value of some commodity of real value, such as wheat. M. Farrand, *The Records of the Federal Convention of 1787*, volume 2 (1966) at 44-45 (reproduced in Appendix II). Madison was suggesting that Congress could do precisely what they have done here: adopt a cost-of-living adjustment formula for federal judges. And he put forward this suggestion as justification for his original draft of Article III, section 1 which barred any increase as well as decrease in compensation.[8]

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[7] *Historical Statistics of the United States—Colonial Times to 1970* (H. Doc. No. 93-78, 1975) (Warren & Pearson wholesale price series).

[8] James Madison was so sure of the adequacy of his wheat cost-of-living adjustment formula that he was willing to ban, as a constitutional matter, all other means for Congress to increase judicial salaries. He could not have been willing to do so if he believed, as the Government would urge, that a cost-of-living adjustment *formula,* once adopted, could not be part of "compensation" under Article III, section 1; for that would provide very little assurance of any compensation adjustment for federal judges.

The evidence is overwhelming that the Constitution's Framers would permit Congress to make a cost-of-living adjustment formula part of the "compensation" that was protected by Article III, section 1.

To the Chicago Bar Association, as *amicus curiae,* this conclusion is of the highest urgency. There are top quality lawyers in our community who would be superb federal judges, but who have declined appointment for financial reasons. And, as the *American Bar Association Journal* has recently noted, resignations have also been common.

> Twenty federal judges have resigned in the past six years, an undetermined number for financial reasons, according to the Federal Judicial Center.
>
> One former federal judge, however, charges the executive and legislative branches of the government with abandoning and "betraying" the judiciary. Thomas Masterson, for seven years a judge in the Eastern District of Pennsylvania until his resignation in 1973, quit "after recommendations for higher judicial salaries were blocked by one political branch or the other." "I had had it," he recalls.

66 *ABA Journal* 19 (January, 1980).

These developments disserve the public, our clients and our profession. Congress, in 1975, took one important step to remedy the problem. It gave to judges and to candidates for the judiciary a cost-of-living compensation scheme; not an overly generous one, but *one* assurance that Congress deemed appropriate and necessary. That *assurance* means nothing, however, if Congress can take it back, or refuse to fund it. The adjustment formula, as a compensation plan, is lost.

That conclusion bears upon all the other motives underlying Article III, section 1, as well; not merely the concern with attracting and retaining quality judges. An adjustment

scheme, if granted, must become a part of undiminishable compensation, for all the reasons that salary itself is. This is a very common-sense conclusion flowing from an awareness of what things matter to an individual's finances in the present times. The Supreme Courts of Delaware and California reached this conclusion without the slightest hesitation in interpreting their own state constitutions.[9] The logic is direct: for whatever reasons the legislature may not tamper with a judge's salary once granted, it may not tamper with a judge's cost-of-living adjustment formula, once granted. And Congress has granted such a formula here.

The essence of the Government's argument in response is that a cost-of-living adjustment is not the same as salary received, for Article III, section 1 purposes. Article III, section 1 may prevent Congress from cutting judges' salaries,[10] but, in the Government's view, it does not keep Congress from rescinding an inchoate right, a benefit promised but not yet enjoyed, for that is no different from an expectancy or hope of some new emolument.

The answer to this position is inextricably immersed in the Constitution itself. Congress was given the power to increase compensation but not diminish it, as the result of the compromise discussed above. It would have been better from a separation of powers viewpoint if Congress could do neither; but increases were a practical necessity and the power to take away was perceived to be the more potentially corrupting. The corrupting element was the fact that a

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[9] *Stiftel* v. *Malarkey*, 384 A.2d 9 (Sup. Ct. Del. 1977); *Olson* v. *Cory*, 26 Cal. 3d 672, 609 P.2d 991, 164 Cal. Rptr. 217 (Sup. Ct. Cal. 1980).

[10] Actually, the Government does not even concede this much, because of its innovative reading of "shall not be diminished" to mean "sometimes shall not be diminished." *See* section 1 of this argument, *supra*.

judge could stand in one financial position on one day, and in a worse one the next day, by Act of Congress. *The Federalist No. 79* (Hamilton), *supra*. That power was too much to give to one branch over another; especially where the judicial branch had, intentionally, been cut off from its principal means of alternative financial reward, the private practice of law.

It is this power to *worsen* a judge's financial position that was absolutely forbidden, and it is this power that the government would now restrict to a very narrow scope: cash-in-hand. *But the protection of compensation from diminution must be as broad as the potential to place judges in a less favorable financial position, for that was the intent of the clause.* And it is simply not true that the financial position of judges can be made worse by Congress only with regard to cash-in-hand.

Consider, as one example, a provision for medical insurance provided for judges by Act of Congress. At any given moment, a healthy judge might not be drawing down his medical expense reimbursement. Indeed, he may never receive any payment at all, if he stays healthy. Payment is contingent on uncertain future events. Yet having the medical coverage *is* a present financial benefit. If it were taken away, a judge might well invest his own funds to obtain similar coverage. Although payments are not presently *received,* the judge has a present benefit from the existence of the scheme, and the assurance it provides. Only a sophist would deny that that benefit is real compensation presently possessed.

It is the same with a cost-of-living adjustment. Many unions will sacrifice salary at a bargaining table to obtain a right to a cost-of-living adjustment. Any long-term employment contract (and a judge's is, designedly, for life)

negotiated in modern times will make some provision for the rising cost-of-living, or implicitly compensate for the absence of one. And, as with the medical benefit, an employee who lacks a cost-of-living adjustment will likely alter his other investments, to the extent he is able, to ward against the contingency of higher living costs.

These are practicalities of the modern economy; not word games played on the phrases "effective," "payable," and "receive[d]." A judge who took office in 1975 accepted a position whose compensation was given as a set sum plus an annual cost-of-living adjustment. That autumn, he received the salary increase called for by that adjustment scheme. At that moment, he may fairly well have felt reassured that, come what may, his salary would be adjusted as were those of the vast majority of federal employees as costs rose. But in October of 1976, he was cut off from the adjustment all those others received. And the same event occurred in October of 1977, 1978 and 1979. Has the judge lost anything that he possessed in 1975? Of course he has. He had been guaranteed an adjustment scheme. But he has it no longer. Each autumn, Congress may or may not adjust his salary. The judge takes his chances as he does with any increase, as judges always have. What, then, remains of the cost-of-living adjustment scheme of 1975? The judge has lost it; and, to the small extent his means will allow, he had better make provision for the contingency of inflation through private investments with individuals, companies or governments who still honor *their* commitments.

It is unrealistic and it is disserving to the Constitution's purposes, to feign the belief that only cash-in-hand is protected by the term "compensation."

3. On the non-Constitutional issues, amicus expresses no opinion.

On the non-Constitutional arguments presented, *amicus curiae* does not take a position. If the present matter can be settled on non-Constitutional grounds, then Article III, section 1, will have been spared a most undermining attack. But if the Constitutional argument must be reached, *amicus* can see only one resolution that does not, quite literally, surrender the financial independence of the federal judiciary. That resolution must be that (even though inflation might not have reached those levels at which an *obligation* devolves upon Congress to adjust federal judges' salaries) where a Congress has deemed it advisable to make a cost-of-living adjustment formula part of compensation, a later Congress, for whatever motive, may not deprive federal judges of the formula already made part of their compensation. Any attempt to do so must be resisted. A contrary holding would deprive Congress of the authority to make a lasting guarantee of the adequacy of compensation that Congress itself may deem necessary to retain good judges.

CONCLUSION

No court has ever held that Congress could diminish the compensation of a federal judge, as such. The Government's attempt to engraft a qualification permitting such diminutions is without support in case law, and directly undermines the Framers' expressed rationale for providing for undiminishable compensation. And the term "compensation" must not be read to mean merely salary received. If it were, a vital tool in the attraction and retention of qualified federal judges would be lost; for, in modern times, it is appropriate for the Congress to take care not only of a judge's stated dollar salary, but also of a judge's legitimate concerns about the pace of inflation. And Congress has chosen to make such provision here. If subsequent Congresses can remove from judges those elements of compensation which they have been given, then Congress has become no different from a despotic King, who "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

Amicus curiae urges affirmance of the District Court.

Respectfully submitted,

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APPENDIX I

	U. S. District Judge Actual Salary	In 1968 Dollars		If Adjusted As Required By Statute			If Appreciated At An Attorney's Rate(C)		
				Nominal	1968 Dollars		Nominal	In 1968 Dollars	
		(A)	(B)	$	(A)	(B)	$	(A)	(B)
1968	$40,000	$40,000	$40,000				$40,000	$40,000	$40,000
1969	40,000	37,960	38,498				42,489	40,322	40,893
1970	40,000	35,838	37,138				45,753	40,993	42,479
1971	40,000	34,361	35,965				49,150	42,221	44,192
1972	40,000	33,264	34,425				51,344	42,698	44,188
1973	40,000	31,315	30,438				54,395	42,584	41,392
1974	40,000	28,219	25,609				57,824	40,794	37,020
1975	42,000	27,149	24,614	$42,000	$27,149	$24,614	64,044	41,398	37,533
1976	42,000	25,668	23,525	44,000	26,891	24,645	69,182	42,280	38,749
1977	54,500	31,289	28,765	58,300	33,471	30,771	74,030	42,501	39,074
1978	54,500	29,078	25,392	61,500	32,812	28,654	N/A	—	—
1979	54,500	26,086	22,399	65,800	31,494	27,043	N/A	—	—

(A) Using Consumer Price Index

(B) Using Wholesale Price Index

(C) Using survey of Attorneys' salaries from Bureau of Labor Statistics (BLS Level V).

N/A Signifies data are not available.

APPENDIX II

Max Farrand, *The Records of the Federal Convention of 1787*, Vol. 2 (1996).

FARRAND AT PP. 44-45 (JULY 18, 1787):

[Mr.] M[adison] moved that the Judges should be nominated by the Executive, & such nomination should become an appointment [if not] disagreed to within . . . . days by ⅔ of the 2d. branch. Mr. Govr. [Morris] 2ded. the motion. By common consent the consideration of it was postponed till tomorrow.

"[To hold their offices during good behavior" & "to receive fixed salaries" agreed to nem: con:]

"In which (salaries of Judges) no increase or diminution shall be made, [so as to affect the persons at the time in office."]

Mr. Govr. Morris moved to strike out "or increase". He thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges.

Docr. Franklin [was in favor of the motion], Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.

Mr. [Madison.] The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to suffered, if it can be prevented. The variations in the value of money, may be guarded agst. by taking for a standard wheat or

some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to effect persons in office.

Mr. Govr. Morris. The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country. The increase of business can not be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in the single tribunal—Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out "or increase".

Mas. ay. Cont. ay. Pa. ay. Del. ay. Md. ay. Va. no. N.C. no. S.C. ay. Geo. [absent] [Ayes—6; noes—2; absent—1.] [The whole clause as amended was then agreed to nem: con:]

• • • •

FARRAND AT PP. 429-430 (AUGUST 27, 1787):

Mr. Madison & Mr. McHenry moved to reinstate the words "increased or" before the word "diminished" in the 2d. Sect: Art XI.

Mr. Govr. Morris opposed it for reasons urged by him on a former occasion—

Col. Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. Pinkney. The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary,* larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr Govr Morris said the expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.

On the question

N.H. no—Ct no. Pa no. Del. no—Md. divd Va ay—S.C. no—Geo. abst. [also Masts—N.J. & N—C—] [Ayes—1; noes—5; divided—1; absent—4.]

Mr. Randolph & Mr. Madison then moved to add the following words to sect 2, art XI. "nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof"

On this question

N.H. no. Ct. no—Pa. no. Del. no. Md ay—Va ay—S. C. no. Geo—abst [also Mas. N.J. & N.C.] [Ayes—2; noes—5; absent—4.]